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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of)	
)	
Reallocation of the 216-220 MHz,)	WT Docket No. 02-208
1390-1395 MHz, 1427-1429 MHz,)	RM-9267
1429-1432 MHz, 1432-1435 MHz,)	RM-9692
1670-1675 MHz, and 2385-2390 MHz)	RM-9797
Government Transfer Bands)	RM-9854
)	RM-9882

02-81

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**JOINT COMMENTS OF
DATEX SPECTRUM, L.L.C. AND
U.S. TELEMETRY CORPORATION**

Datex Spectrum, L.L.C. ("Datex") and U.S. Telemetry Corporation ("UST") (together, "UST/Datex"), by counsel and pursuant to Section 1.415(b) of the Commission's Rules, hereby submit the following Joint Comments in connection with the Notice of Proposed Rule Making released February 6, 2002 in the above-referenced proceeding (the "*NPRM*"). Among other things, the *NPRM* proposes new service rules for the licensing of 27 MHz transferred from Government to non-Government use pursuant to the Omnibus Budget Reconciliation Act of 1993 and the Balanced Budget Act of 1997.¹

¹ See Pub. L. 103-66, 107 Stat. 312 (1993) and Pub. L. 105-33, 111 Stat. 251 (1997). See *Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, Report and Order and Memorandum Opinion and Order*, ET Docket No. 00-221, FCC 01-382 (released January 2, 2002) (the "*Reallocation Report and Order*"). The *NPRM* is a companion proceeding to this "*Reallocation Proceeding*."

Datex filed Comments and Reply Comments in the *Reallocation Proceeding*, and copies of those filings are attached hereto for the convenience of Commission staff and incorporated herein by reference. See Comments of Datex Spectrum, L.L.C. in ET Docket No. 00-221 (submitted March 8, 2001) and Reply Comments of Datex Spectrum, L.L.C. in ET Docket No. 00-221 (submitted April 9, 2001) ("*Reallocation Reply Comments*"). UST also filed Reply Comments in the *Reallocation Proceeding*. See *Reply Comments of U.S. Telemetry Corporation* in ET Docket No. 00-221 (submitted April 9, 2001).

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Introduction

The *NPRM* seeks comment on rules for the 216-220 MHz band that affect UST/Datex's significant investments in license acquisition and development in the 218-219 MHz Service. This service is allocated on a primary basis in the 218-219 MHz band and has formed the basis of a strategic relationship between Datex and UST in developing a national wireless telemetry business. UST and Datex have focused considerable effort in developing commercial and public-safety narrowband data applications to make full use of the regulatory flexibility that recent FCC rule changes have afforded to 218-219 MHz Service licensees.² Maintaining full and interference-free operating parameters in this band is critical to the development of new and efficient services, which Commission policies are designed to promote.

UST/Datex commend the Commission for retaining existing service rules for the 218-219 MHz Service and for its recognition of the inefficiencies associated with the introduction of geographic-area licensing for secondary telemetry services in the 217-220 MHz band. However, UST/Datex object to proposals by Securicor Wireless Holdings, Inc. ("Securicor") and Warren Havens ("Havens") to introduce new speculative services into the 216-220 MHz band. As Datex established in its *Reallocation Reply Comments*, both proposals threaten to disrupt the primary services in the 216-220 MHz Band, including the 218-219 MHz Service. For these reasons, the FCC should conclude that shoehorning either of these proposals into the existing band plan undermines the public interest.

² See generally *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Report and Order and Memorandum Opinion and Order*, FCC 99-239, WT Docket No. 98-169, 15 FCC Rcd 1497 (1999).

I. SECURICOR'S PROPOSED "WHITE SPACE" LICENSING IN THE 216-220 MHz BAND MUST BE REJECTED.

The *NPRM* seeks comment on Securicor's proposal for licensing of 216-220 MHz spectrum that "has not yet been previously licensed on a primary basis" through a competitive bidding system.³ In its *Reallocation Reply Comments*, Datex demonstrated that the existing band plan cannot accommodate Securicor's desire to annex adjacent spectrum to boost the company's interests in 220 MHz Service licenses.⁴ The proposal's efficiencies, if any, are outweighed by the need to preserve incumbent users' expectancy interests in preserving the value of licenses obtained by competitive bidding.

Securicor proposes competitive bidding for so-called "Phase II" licenses on a geographic-area basis using the "white areas" in the 216-220 MHz band. Presumably, this plan would include those 218-219 MHz Service MSAs where the license has been defaulted or returned to the Commission, and all of the RSAs, which have never been auctioned. This is an untenable proposal that will cause significant harm to the nascent 218-219 MHz Service.

As the Commission is well aware, the 218-219 MHz Service has had a number of false starts, based on the lack of commercially viable equipment and the growth of electronic data transfer. Triggered by important regulatory changes and technological advancements, the industry is beginning to deploy service in various markets throughout the country. UST and Datex have constructed systems and initiated operations in the Baton Rouge and Bakersfield markets, with plans for numerous others.

³ See *Comments of Securicor Wireless Holdings, Inc.* in ET Docket No. 00-221 at p. 2 (filed March 8, 2001); *NPRM* at ¶48.

⁴ See *Reallocation Reply Comments* at pp. 6-7.

Critical to these plans is the ability to maintain uniform spectrum rules for the 218-219 MHz band. Nationally, Securicor's proposed licensing structure could lead to a hodgepodge of services in different geographic markets. Existing operators will find it difficult to obtain equipment or raise funds if they are consigned to the currently licensed islands that dot the country – in effect, the market will be too small and too geographically dispersed to encourage meaningful investment. Operators must be able to expand into adjacent markets by purchasing licenses at auctions involving only the 218-219 MHz Service as it is currently licensed. Such efficiencies are vital to maximizing the value of 218-219 MHz Service licenses to the full extent of the FCC's policies, and as envisioned by its rules and as expected by those who have purchased and want to purchase licenses. The better course of action would be to auction the reclaimed MSAs and never-auctioned RSAs as currently intended by the rules and as relied on by existing licensees. For these reasons, as well as others specified in Datex's *Reallocation Reply Comments*, UST/Datex urge the FCC to reject Securicor's proposal in its entirety.

II. WARREN HAVENS' PROPOSED "ADVANCED TECHNOLOGIES 220 MHz SERVICE" IN THE 216-225 MHz BAND MUST BE REJECTED.

UST/Datex also object to Havens' proposal to introduce a new "Advanced Technologies 220 MHz Service" in the 216-225 MHz band. Havens' proposal is predicated on his allegations that primary services in the 216-220 MHz are "lightly used,"⁵ but the *NPRM* rightly contradicts Havens' assumption in concluding that heavy incumbent use in the band would render Havens' proposal infeasible.⁶ Moreover, Havens fails to demonstrate protection to incumbent services in

⁵ See *Comments of Warren C. Havens* in ET Docket No. 00-221 at p. 3.

⁶ See *NPRM* at ¶49.

his proposal; rather, Havens would prefer to scrap a carefully crafted band plan and licensing system and replace it with his own speculative uses.⁷ Havens' proposal must be rejected.

**III. THE FCC CORRECTLY CONCLUDED THAT SECONDARY
TELEMETRY IN THE 217-220 MHz BAND SHOULD CONTINUE TO BE
LICENSED ON A SITE-BY-SITE BASIS.**

UST/Datex concur with the FCC conclusion that secondary telemetry operations in the 217-220 MHz band should continue to be licensed on a site-by-site basis.⁸ The costs of implementing geographic-area licensing greatly outweigh potential benefits of such licensing, which would place significant coordination and interference burdens on incumbent primary users in the 217-220 MHz band, including 218-219 MHz Service licensees. The *Reallocation Report and Order* retains the secondary status of telemetry in this band,⁹ and UST/Datex believe that the future development of the 218-219 MHz Service would be unduly hindered by the inefficiencies associated with coordinating operations with geographically licensed secondary telemetry services in the 217-220 MHz band. Thus, UST/Datex agree that the FCC should retain site-by-site licensing for secondary telemetry services in this band.

⁷ See *Reallocation Reply Comments* at pp. 7-9.

⁸ See *NPRM* at ¶¶58-59.

⁹ See *Reallocation Report and Order* at ¶33.

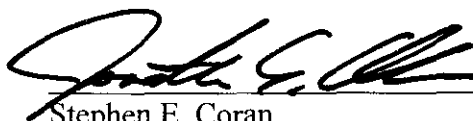
Conclusion

UST/Datex submit that the proposals of Securicor and Havens must be rejected because of heavy incumbent use of services in the 216-220 MHz band and because of the need to preserve the full value and potential of 218-219 MHz Service licenses. Accordingly, UST/Datex respectfully submit that the FCC should not modify its service rules to accommodate these proposals.

Respectfully submitted,

**DATEX SPECTRUM, L.L.C. and
U.S. TELEMETRY CORPORATION**

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Dated: March 4, 2002

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Attachments

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Government Transfer Bands

ET Docket No. 00-221
RM-9267
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RM-9854

To: The Commission

COMMENTS OF
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Summary of Comments

In the accompanying Comments, Datex Spectrum, L.L.C. (“Datex”) opposes the proposal of Regionet Wireless License, LLC (“Regionet”) to re-allocate the 216-220 MHz spectrum band for two-way paging services.

Datex has invested millions of dollars in acquiring 218-219 MHz Service licenses and developing a nationwide wireless telemetry business that is on the verge of commercial deployment. The watershed proceeding leading to the adoption of significant rule changes in September 1999 triggered the development of technology and the infusion of capital that have fueled Datex’ entry and success in the 218-219 MHz business.

Notwithstanding the Commission’s efforts to reinvigorate the service, Regionet asks the Commission to re-allocate the 216-220 MHz band for two-way paging services. Any such “re-purposing” of the spectrum is fraught with overwhelming problems.

First, changing the allocation would undo the very policies the Commission sought to promote with its new rules, before those rules have had an opportunity to create their intended impact. Such re-allocation also would lead to further administrative proceedings and uncertainty that would delay the provision of service to the public.

Second, any re-allocation would threaten the ability of existing 218-219 MHz Service licensees to construct and operate systems and would curtail possibilities to expand service. The entire 216-220 MHz band is encumbered with licensed commercial facilities or Governmental users, making it difficult for additional services – especially those, like paging, that require higher power – to wedge their way into the band without causing harmful interference to incumbents and to Channel 13 licensees operating in the 210-216 MHz band. For the 218-219 MHz Service licensees, a re-allocation would limit

their legal right to provide “substantial service” by the end of their ten-year license term, and would lead to inefficient construction or a *de facto* partitioning of the spectrum in favor of paging services. Moreover, any reclamation of spectrum of existing auctioned licenses would be unprecedented. Licensees seeking to acquire MSA and RSA licenses when the Commission conducts auctions also could be unfairly compromised in their ability to expand service.

Third, Regionet has not demonstrated how its proposed paging service can co-exist with incumbent 218-219 MHz services. Regionet also has not shown a sufficient demand for new paging spectrum. Interconnected paging services are, in fact, permissible under the existing 218-219 MHz Service allocation.

For these reasons, as discussed in greater detail in the accompanying Comments, the Commission should reject Regionet’s proposal and maintain the allocations currently applicable in the 216-220 MHz band.

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To: The Commission

**COMMENTS OF
DATEX SPECTRUM, L.L.C.**

Datex Spectrum, L.L.C. ("Datex"), by counsel and pursuant to Section 1.415 of the Commission's Rules, hereby submits the following comments in response to the *Notice of Proposed Rule Making*, ET Docket 00-221, released November 20, 2000 (the "*NPRM*").

Background

Datex is in the business of acquiring 218-219 MHz licenses and, through its strategic relationship with U.S. Telemetry Corporation ("USTC"), is developing a nationwide wireless telemetry business using frequencies in the 218-219 MHz band. To date, Datex has raised nearly \$20 million in private investment to acquire rights to approximately 60 licenses, construct systems and operate competitive businesses.

Currently, Datex and USTC are beta testing wireless telemetry in Baton Rouge, Louisiana, utilizing both fixed and mobile applications. Commercial applications include remote meter reading for electric, gas and water meters, advanced energy management services such as remote connect/disconnect, load management and real-time pricing,

security monitoring and fleet tracking. Many of these services have public safety benefits that Datex and USTC plan to provide. By virtue of the propagation characteristics of the 218-219 MHz spectrum, tests have demonstrated that two-way signals can be transmitted and received from distances of 25 miles. When fully implemented, the 218-219 MHz Service will support an efficient infrastructure for narrowband data applications at a lower cost than services in existence today.

Datex' entry into the wireless business was, in no small measure, predicated on rule changes promulgated by the Commission in September 1999. Designated in 1992 as the "Interactive Video and Data Service" ("IVDS"), the 218-219 MHz band initially was intended for the provision of interactive television services.¹ However, from 1995 to 1999, several factors limited the development of the 218-219 MHz Service. First, the third-party-provided equipment was not commercially or economically available, despite numerous attempts to develop and market technology that would facilitate a sensible business plan. Second, the limited amount of bandwidth available to a licensee – 500 kHz – limited the types of services that could be offered on a competitive basis in a given market, especially in light of the proliferation of wired and wireless broadband services and the explosive growth of the Internet. Third, as the interactive television service originally envisioned edged toward obsolescence, several technical restrictions in the licensees' initial authorizations prohibited them from adapting to the changing marketplace.² Predictably, financing was not available to licensees on commercially

¹ *Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video and Data Services*, 7 FCC Rcd 1630, 1630-33 (1992).

² *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service. Report and Order and Memorandum Opinion and Order*, FCC 99-239, WT Docket No. 98-169, RM-8951, 15 FCC Rcd 1497 (1999) ("218-219 MHz Order") at ¶¶ 15-16.

reasonable terms. Together, these circumstances conspired to prevent the 218-219 MHz industry from getting off the ground.

In September 1999, the Commission reinvigorated the 218-219 MHz Service by establishing rules to facilitate technologically and economically efficient uses of the spectrum to meet the public's current and future spectrum needs.³ Significant among these were the new installment payment rules, rules permitting a licensee to hold licenses for both frequency segments in a given market, interconnection rights, the extension of the license term to ten years and the relaxation of certain technical rules. The new flexibility promoted by these rules served to ignite new waves of investment and public participation in the 218-219 MHz Service and offered opportunities to develop technology commensurate with the band's promise.⁴

In the *NPRM*, the Commission seeks comment on a Petition for Rule Making filed by Regionet Wireless License, LLC ("Regionet") requesting re-allocation of the 216-220 MHz band for two-way paging services.⁵ According to Regionet, the 218-219 MHz Service has not been successful, and the Commission thus should allow paging services to occupy the band. Aside from being technically unproven, Regionet's petition is anachronistic because it predates the 1999 rebirth of the 218-219 MHz Service, which has

³ See, e.g., *218-219 MHz Order* at ¶ 4.

⁴ By *Public Notice*, DA 01-583, released March 5, 2001, the Commission reported the elections made by licensees eligible to participate in the payment restructuring plan adopted in the *218-219 MHz Order*. Altogether, the Commission reported the status of approximately 278 licenses. With respect to approximately 195 licenses, licensees elected the "Resumption" of payments option and with respect to approximately 32 other licenses, licensees elected the "Prepay-Retain" option, meaning that more than 80 percent of the licenses will be retained. Only approximately 51 licenses were designated with either "Amnesty" or "Prepay-Return." By any measure, these results demonstrate belief in the present and optimism about the future of the 218-219 MHz Service consistent with its current allocation and permitted uses.

⁵ See Petition for Rule Making, RM-9692 (filed June 10, 1999) ("Regionet Petition").

given rise to significant development of technology and investment in competitive business applications. For these reasons, and those discussed below, Datex respectfully requests that the Commission preserve the *status quo* with respect to the allocation of frequencies in the 216-220 MHz band.

Discussion

I. REALLOCATION OF THE 216-220 MHZ BAND WOULD BE INCONSISTENT WITH THE PUBLIC INTEREST.

A. The 218-219 MHz Service Is Now A Viable, Developing Service That Should Not Be Encumbered By Other Services.

Regionet's request for re-allocation of the 216-220 MHz band rests primarily on its perception that an "unfortunate" series of events has "rendered IVDS essentially obsolete."⁶ While this may have been partly accurate at one time, the rules adopted in 1999 in the *218-219 MHz Order* have transformed the service and have proved this perception moot. In anticipation of the *218-219 MHz Order* and since 1999, significant capital has been available to the industry to support the development of new technology and applications that can compete effectively with incumbent wireless services. For the first time, investors are supporting the widespread acquisition and aggregation of licenses, cost-effective and operationally efficient equipment is available, and operators are in the process of deploying services to the public.

The 218-219 MHz Service represents a major segment of the 216-220 MHz band, as well as a viable and sustainable industry capable of providing the public with a flexible, low-cost suite of services. Additionally, rules adopted in the *218-219 MHz Order* provide licensees with enhanced flexibility to tailor their service offerings to meet

⁶ Regionet Petition at 2.

an ever-evolving marketplace.⁷ Licensees may now operate as common carriers and may develop one- and two-way, fixed or mobile operations, thereby expanding the scope of services that 218-219 MHz Service licensees may provide.⁸ The extension of the license term to 10 years has provided the added certainty and stability needed to attract and secure financing, as it gives investors a sufficient time period to obtain reasonable returns on their investments.⁹ Commensurate with the *218-219 MHz Order* and the Commission's efforts to craft more flexible technical and service rules for spectrum used by other services,¹⁰ private technological development has increased and 218-219 MHz Service licensees are well positioned to build out the infrastructure necessary to bring wireless services to the public via the 218-219 MHz spectrum.

"Re-purposing" the spectrum, as suggested by Regionet, would represent a fundamental and flawed shift in Commission policies designed to "maximize the efficient and effective use of the 218-219 MHz frequency band . . . [to] enable licensees to meet the public's current and future needs through the most technically and economically efficient use of this spectrum practicable."¹¹ Less than two years ago, the Commission took great strides to inject life into the 218-219 MHz Service, and the results of those efforts are beginning to manifest themselves. As Datex's success in raising funds and

⁷ See, e.g., *218-219 MHz Order* at ¶ 19.

⁸ *Id.* at ¶¶ 19, 23.

⁹ See *218-219 MHz Order* at ¶ 31.

¹⁰ See generally *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230 (2000) at ¶ 93 (noting that "[t]he Commission has recognized that public interest considerations may favor flexible use, particularly in regard to new spectrum allocations.")

¹¹ *218-219 MHz Order* at ¶ 2.

developing strategic relationships with partners and customers has confirmed, tremendous opportunities exist to take advantage of the flexibility that the new rules are designed to foster and to provide competitive wireless services. To alter the very essence of the 218-219 MHz Service before the public can realize the benefits of spectrum development spawned by the rule changes would inexcusably eliminate the prospects of competitive success in favor of Regionet's speculative claim that a high-powered two-way paging service would provide the "highest and best use."¹² Additionally, a "re-purposing" of the spectrum would frustrate the Commission's goals regarding the timely delivery of new wireless services to the public and, instead, would lead to yet another protracted administrative delay and force active and successful business plans and technical efforts to be re-written and re-designed based on yet another re-write of the rules. This delay, most significantly, would occur just as licensees' good-faith efforts and the Commission's goals were coming to fruition.

B. Permitting Paging Services To Operate On A Co-Primary Basis With Incumbent 218-219 MHz Licensees Would Threaten Existing Rights And Future Opportunities.

In the *NPRM*, the Commission "tentatively conclude[d] that it may be inappropriate to allow new, co-primary services in these segments, given the potential to disrupt or limit the operation of the primary licensees in the 216-220 MHz band."¹³ The Commission has correctly anticipated the shortcomings generally associated with a re-allocation and specifically embodied in Regionet's proposal.

As the Commission acknowledges, and a review of the International Table of Frequency Allocations confirms, the 216-220 MHz band is heavily encumbered with

¹² Regionet Petition at 7.

various Governmental and non-Governmental services.¹⁴ In light of the encumbered nature of the band, the Commission seeks comment on “the viability of incumbent, non-Government services in the band, if we were to license new primary services.”¹⁵ As the following reflects, the addition of co-primary services to the 216-220 MHz band would jeopardize the current viability of the 218-219 MHz Service, place substantial amounts of invested capital at risk and stifle opportunities for expansion.

First, permitting new co-primary services to occupy the band would be tantamount to partitioning the 218-219 MHz spectrum. In licensed 218-219 MHz Service markets,¹⁶ under rules adopted in the *218-219 MHz Order*, licensees have until the end of their respective license terms – about four years from now – to provide “substantial service.”¹⁷ If two-way paging services were made co-primary with permissible 218-219

¹³ *NPRM* at ¶ 15.

¹⁴ See *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19868 at ¶ 27, Appendix A (1999) (“Spectrum Policy Statement”); *NPRM* at ¶¶ 8-11. The band is allocated domestically to Government and non-Government Maritime Mobile Services on a primary basis, and to the Government Radiolocation Service, Government and non-Government Fixed Service, the Aeronautical Mobile Service, the Land Mobile Service and the Low Power Radio Service on a secondary basis. The 218-219 MHz Service represents an allocation on a primary basis and the Amateur Radio Service is allocated on a secondary basis. Furthermore, the Automated Maritime Telecommunication System is supported by 217-218 MHz and 219-220 MHz segments. Non-Government incumbent licensees thus use this band extensively, and the Commission acknowledges that removing the Government uses from the spectrum would offer few, if any, viable opportunities for new licensing and little new capacity.

¹⁵ *NPRM* at ¶ 17.

¹⁶ Many of the licensees for Metropolitan Statistical Areas (“MSAs”) have defaulted on their payments, and the Commission has indicated that it will re-auction those markets. See *NPRM* at 5, n.19. Subsequently, the Commission postponed the auction for 428 designated Rural Service Areas (“RSAs”) while it considered rules ultimately adopted in the *218-219 MHz Order*. See *Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licensees*, Public Notice, 12 FCC Rcd 1389 (1997).

¹⁷ In the *218-219 MHz Order*, the Commission defined “substantial service” as “service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal.” *218-219 MHz Order* at ¶ 70. The Commission also indicated it would consider certain “safe harbors” in determining whether a licensee provided “substantial service.” Included among these are niche services or specialized services that do not require a high level of coverage. Significantly, the “substantial

MHz services, conceivably the Commission could auction the then-unserved markets for two-way paging services before the end of the 218-219 MHz Service licensees' license term, denying licensees their right to a full license term and the right to demonstrate that they have provided "substantial service" at the end of that term. Alternatively, in order to "beat the clock," 218-219 MHz Service licensees would be forced to build out their market areas with systems designed to satisfy a regulatory standard rather than a prudent business objective, a grossly inefficient and economically imprudent exercise. In either case, the value of the 218-219 MHz spectrum – bought for and paid for in good faith by the licensees – would be devalued in favor of Regionet's speculative and unproven proposal.

Second, it is unlikely that the two-way paging service proposed by Regionet could protect 218-219 MHz systems from harmful interference. In its Petition, Regionet proposes that the Commission authorize two-way base station operations at a maximum effective radiated power ("ERP") of 1000 watts. Pursuant to Section 95.855 of the Commission's Rules, in the 218-219 MHz Service, fixed CTSs and RTUs are limited to 20 watts ERP, and mobile RTUs are limited to 4 watts ERP. Permitting paging services to co-exist with 218-219 MHz systems on a co-primary basis – essentially a "first in wins" scenario – likely would gut the service that 218-219 MHz Service licensees now are deploying. It is conceivable that the Commission could adopt service rules and auction licenses to paging services prior to the end of the initial 218-219 MHz Service license terms, and paging systems operating at 1000 watts ERP would then be constructed. Despite Regionet's statement that it would cooperate with incumbents, the

service" showing is assessed upon license renewal, not at some interim period as a factor to determine whether a license should retain its license for the balance of the authorized term.

significant differences in power requirements and the financial resources at paging companies' disposal suggest that 218-219 MHz Service licensees would, practically speaking, be denied the benefits of incumbency, making it extremely difficult if not impossible for a 218-219 MHz Service licensee to build any viable system in a way that could serve the public. A co-primary allocation for a new service with dramatically higher power limits would really not be co-primary at all, but rather would reduce the 218-219 MHz allotment to secondary or non-existent status. Even the prospect of having to coordinate with higher-powered services occupying the same band would lead to uncertainty in the marketplace. The result is even more absurd given that 218-219 MHz licensees still have time remaining on their licenses to provide "substantial service" and that the "safe harbors" include specialized services in small coverage areas.

Third, in addition to the 218-219 MHz Service, the 216-220 MHz frequency band already is encumbered by and allocated to other services. As the Commission acknowledged in the *NPRM*, completed auctions in the 216-220 MHz band subsume three of the four megahertz in the band.¹⁸ Furthermore, allocation of new services to the 216-220 MHz band would introduce a higher potential for interference with television Channel 13, which occupies the 210-216 MHz band. Channel adjacency and higher power requirements for mobile services would threaten to increase Channel 13 interference in a way that 218-219 MHz services do not.¹⁹

¹⁸ *Id.* at ¶ 15.

¹⁹ Datex is aware that Regionet has provided studies showing that television receivers are capable of tolerating 1000 watt ERP signals on adjacent frequencies. Datex assumes that the television industry will analyze those showings and provide the Commission with their analyses.

Fourth, adding two-way paging to the 218-219 MHz band as a co-primary service would substantially limit growth opportunities in the 218-219 MHz Service. As the Commission made clear, the rules adopted in the *218-219 MHz Order* are intended to advance “the public’s current *and future needs*.”²⁰ As noted above, several MSAs and all of the RSAs remain subject to future auction. Many of these markets are of strategic value to Datex, which plans to acquire licenses at auction or from auction winners upon FCC approval. In markets where Datex already holds interests in licenses, it could increase system capacity without substantial increase in equipment costs by acquiring the other license in that market. Similarly, Datex would look to acquire or establish relationships with licensees in markets adjacent to its then-existing markets to obtain efficiencies associated with centralized operations and billing. Other licenses may be valuable to Datex if they are attractive to strategic partners with a local presence in that market. The re-allocation of the spectrum would likely foreclose Datex from many of these opportunities, to the detriment of further private investment, economies of scale and lower costs to customers. Given the inherent inequities between the existing 218-219 MHz Service and the two-way paging service that Regionet advocates, these opportunities and benefits will be substantially reduced, if not foreclosed altogether, by Regionet’s proposed re-allocation.

Finally, it is patently unfair for the Commission to re-claim spectrum that has been auctioned to those who valued it most so that it can be re-auctioned. Significantly, at the time of the auction in 1994, the 218-219 MHz band was unencumbered, and auction winners had the expectation that the spectrum they were valuing and acquiring

²⁰ *218-219 MHz Order* at ¶ 2 (emphasis added).

would remain so.²¹ This expectation was reinforced in 1999 with the extension of the license term, the adoption of the “substantial service” standard and the relaxation of certain technical rules. It goes without saying that many existing licensees that recently elected to retain their licenses would not have done so under the re-allocation scheme proposed by Regionet. Since the Commission began to award licenses by auction, it has never taken back spectrum and re-auctioned it for a different purpose on the basis of some claimed higher and better use.²² To the contrary, in most services – 218-219 MHz and Multipoint Distribution Service, to name two – the trend has been to make the existing rules more flexible so that those licensees that purchased licenses via auction can maximize the value of that spectrum.

Datex and other licensees are on the threshold of reaping the benefit of years of hard work and investment through the delivery of new competitive services to the marketplace. Permitting other co-primary services to shoehorn their way into the band, with dramatically higher power requirements, would undermine and perhaps even preclude this success, and would bring on yet another lengthy delay in the provision of services in the 218-219 MHz band. Datex thus supports the Commission’s conclusion that allowing new services in the band would disrupt the operations of incumbent licensees and would thwart their plans for future development and service.

²¹ Licensees are, of course, required to protect Channel 13 in applicable areas, and licensees factored this into their valuation formulas in determining where and how much to bid. Part 95 of the Commission’s Rules place certain notice obligations on licensees in markets that are in close proximity to Channel 13 stations.

²² As a recent example, in the Commission’s *Interim Report, Spectrum Study of the 2500-2690 MHz Band, “The Potential for Accommodating Third Generation Mobile Systems,”* released November 15, 2000 (“*3G Interim Report*”), the Commission stated that re-allocating the MDS portion of the 2500-2690 MHz band would be “problematic because . . . all of the MDS channels have been licensed on a geographic basis through the competitive bidding process and these geographic licensees have *legal rights* to build systems anywhere within their BTA that is not encumbered” with other MDS channels. *3G Interim Report* at 57 (emphasis added).

II. REGIONET HAS NOT JUSTIFIED ITS REQUEST TO RE-ALLOCATE THE 216-220 MHZ BAND.

A. Regionet Has Not Shown How Paging Service Would Co-Exist With Incumbent 218-219 MHz Services.

Regionet requests an allocation of the 218-219 MHz band to the Paging and Radiotelephone Service, paired with the 216-217 MHz band to allow two-way paging and response.²³ However, Regionet offers no technical data to demonstrate that its proposed paging services would co-exist with the services of incumbent 216-220 MHz Service licensees,²⁴ and admits that the power limitations associated with the 218-219 MHz Service “currently make operation of a paging base station in the band impracticable.”²⁵ As noted above, Regionet asserts that paging companies would “make an arrangement” with incumbent 218-219 MHz licensees in an effort to support paging operations at the substantial ERP requested, but provides no support for how such “arrangements” would work in the real world.²⁶ Such cavalier claims fail to justify the large-scale re-allocation that Regionet seeks and, perhaps more importantly, portend of an uneven playing field dominated by well-financed, high-powered paging interests.

B. There Are Other Means Available For The Operation Of Paging Services.

As presently allocated, the 218-219 MHz band accommodates a number of permissible fixed and mobile uses, including paging, so long as these services comport with applicable technical rules. Thus, Regionet may rely on the 218-219 MHz Service’s

²³ Regionet Petition at 1.

²⁴ *Id.* at 6-7.

²⁵ *Id.* at 4-6.

²⁶ *Id.* at 6-7.

operational flexibility to provide paging in accordance with existing rules. Parties such as Regionet may also acquire spectrum from licensees that partition and/or disaggregate their spectrum pursuant to existing rules.²⁷ Datex respectfully submits that this flexible approach would promote efficient use of the 218-219 MHz spectrum.

Conclusion

Datex applauds the Commission's tentative conclusions that it would be inappropriate to re-allocate the 216-220 MHz band. Datex has begun to capitalize on the flexibility inherent in the new rules, and firmly believes that any effort to change the allocation of the 218-219 MHz band threatens the long-standing efforts of Datex and others to develop the spectrum and undermines future benefits to the American public. Accordingly, Datex respectfully submits that the Commission should maintain the allocations currently applicable to the 216-220 MHz band and should reject Regionet's proposal to re-allocate the 218-219 MHz band for paging services.

Respectfully submitted,

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²⁷ See 218-219 MHz Order at ¶ 93-94; *Partitioning Report and Order*, 11 FCC Rcd 21831 (1996).

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Reallocation of the 216-220 MHz,)	ET Docket No. 00-221
1390-1395 MHz, 1427-1429 MHz,)	RM-9267
1429-1432 MHz, 1432-1435 MHz,)	RM-9692
1670-1675 MHz and 2385-2390 MHz)	RM-9797
Government Transfer Bands)	RM-9854

To: The Commission

**REPLY COMMENTS OF
DATEX SPECTRUM, L.L.C.**

Datex Spectrum, L.L.C. ("Datex"), by counsel and pursuant to Section 1.415(c) of the Commission's Rules, hereby submits the following Reply Comments in connection with the Notice of Proposed Rule Making, ET Docket 00-221, released November 20, 2000 (the "*NPRM*").

Background

In the *NPRM*, the Commission proposes to allocate a total of 27 megahertz of spectrum from various bands identified for transfer from Government to non-Government use pursuant to the Omnibus Budget Reconciliation Act of 1993 and the Balanced Budget Act of 1997.¹ In its Comments on the *NPRM*, Datex urged the Commission to retain the existing spectrum allocations for the 216-220 MHz band and to reject the proposal of Regionet Wireless License, LLC ("Regionet")² to reallocate the 216-217 MHz and 218-219 MHz segments for two-way paging services.³ As the Datex Comments and those of other commenters confirm, the 218-219

¹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993) ("OBRA-93"); Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997).

² Petition for Rule Making, RM-9692 (filed June 10, 1999).

³ See Comments of Datex Spectrum, L.L.C. ("Datex Comments").

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MHz Service is a viable industry poised to offer a host of compelling, wireless services. Stimulated by rule changes the Commission adopted in 1999, Datex has raised substantial investment capital to acquire licenses, develop technology and business and consumer applications, and bring spectrally efficient and cost-effective services to market.

Despite the present success of and prospects for Datex and others, some commenters attempt to dismiss and even eliminate the 218-219 MHz Service. These commenters seek to eviscerate viable wireless offerings on the verge of commercial deployment and thwart the sound business plans and expansion paths of all participants in the existing and future 218-219 MHz Service auctions in favor of “repurposing” the spectrum for their speculative uses. As discussed below, and consistent with the views expressed by the overwhelming majority of commenters in this proceeding, Datex respectfully submits that the public interest does not favor the re-allocation of the 216-220 MHz band, and urges the Commission to retain the existing allocation rules.

Discussion

I. RE-ALLOCATING THE 216-220 MHz BAND WOULD DISRUPT EXISTING USES AND SHOULD BE REJECTED.

The vast majority of commenters strongly oppose efforts to allocate new services to the 216-220 MHz band. For example, commenters representing the interests of persons with hearing impairments, as well as hundreds of private individuals utilizing assistive listening devices (“ALDs”), have registered strong opposition to re-allocating the 216-217 MHz portion of the 216-220 MHz band for new services.⁴ These commenters assert generally that the introduction of new services would disrupt the existing use of ALDs and would undermine significant

⁴ See, e.g., Comments of The Alexander Graham Bell Association for the Deaf and Hard of Hearing; Comments of Phonic Ear, Inc.; Comments of the National Association of the Deaf.

investment by parents, schools and others in systems designed to facilitate the use of ALDs.⁵ Other commenters that oppose the introduction of new services in this band currently use 216-220 MHz for services such as radio telemetry in geophysical exploration⁶ and security systems in the health care industry,⁷ and these commenters are understandably concerned about the interference such new services could cause.

Several commenters specifically challenge Regionet's proposal to reallocate the 218-219 MHz band to the Paging and Radiotelephone Service and, significantly, even Regionet's corporate parent now admits that there are more appropriate uses than two-way paging services.⁸ This retreat corresponds with the position of several commenters asserting that Regionet's initial proposal is not technically sound⁹ and would not represent the public interest,¹⁰ that sufficient bandwidth already exists for two-way paging¹¹ and that an additional allocation not only would

⁵ *Id.*

⁶ See Comments of Fairfield Industries, Inc. at 7-9 ("Fairfield Comments").

⁷ See Comments of Instantel, Inc. at 4-6 ("Instantel Comments").

⁸ See Comments of Mobex Communications, Inc. ("Mobex Comments") at 3-4.

⁹ Several commenters note that the two-way paging proposal would not protect incumbents from interference. See, e.g., Initial Comments of U.S. Telemetry Corporation at 8-9 ("USTC Comments") (noting the interference potential attendant to the "[i]nsertion of new services into the existing mix"); Comments of Electronic Tracking Systems, L.L.C. at 7-9 ("Electronic Tracking Comments") (noting that the introduction of new high-power operations in the band would cause severe interference to the many secondary low-power services already operating in the band, such as law enforcement tracking systems); Instantel Comments at 4-8 (noting that two-way paging operations would likely create unacceptable interference with a broad range of incumbent uses, including operations of unlicensed radio frequency devices authorized under Part 15); Fairfield Comments at 7-8 (noting that lower power services such as auditory assistance devices, LPRS, the Amateur Service and telemetry are "extremely susceptible" to interference from high-power services and that Fairfield's geophysical telemetry operations would face reduced effectiveness in exploring for new and expanded oil and gas reserves).

¹⁰ See, e.g., Comments of Millennium Networks, Inc. at 3 ("Millennium Comments") (arguing that the 216-220 MHz spectrum should be used for "innovative new services" rather than expanding the existing bandwidth for two-way paging); USTC Comments at 8-9 (referencing the consumption of FCC resources to referee interference disputes between new and existing services in the 216-220 MHz band and the reduction in value of existing and yet-to-be auctioned licenses in the band from the "sandwiching of spectrum").

¹¹ See, e.g., Millennium Comments at 3.

be unnecessary but would squeeze out small businesses that have devoted significant resources toward efficient and valuable use of the spectrum.¹² Datex applauds Mobex/Regionet's acknowledgment that changed circumstances and the evolving marketplace have undermined the efficacy of Mobex/Regionet's proposed allocation, and Datex concurs with other commenters' objections to the proposal.

II. PROPOSALS FOR NEW SERVICE ALLOCATIONS ARE CONTRARY TO THE PUBLIC INTEREST.

Several commenters propose new allocations and/or licensing structures for the 216-220 MHz band. Datex asserts that new allocations in this band would nullify the recent flexibility granted to the 218-219 MHz Service and would unduly deprive, *ex post*, 218-219 MHz licensees of the value of the licenses they purchased pursuant to the Commission's auction procedures. Although they endeavor to discredit incumbent services, these commenters' efforts are nothing more than a transparent attempt to grab spectrum for speculative purposes at the expense of those that have purchased and developed it for beneficial use and those that seek to exploit it for efficient and cost-effective commercial and public safety purposes. Datex respectfully submits that the public interest does not support these reallocations because they would, as a practical matter, greatly undermine, if not gut entirely, the provision of viable service offerings that are on the threshold of widespread deployment.

Mobex, the corporate parent of Regionet, now agrees that allocation of the 218-219 MHz band to the Paging and Radiotelephone Service "may have been overtaken by events" and that allocation of the band to two-way paging does not represent the most appropriate use of the band.¹³ Nevertheless, Mobex now seeks an additional allocation to boost its AMTS business,¹⁴

¹² *Id.*; see also *USTC Comments* at 6.

¹³ See *Mobex Comments* at 3-4.

to the detriment of consumers that are ready to receive other services in the band, including the 218-219 MHz Service.

Mobex' comments, on their face, demonstrate a reliance on an out-dated perception of the services and opportunities available in the 218-219 MHz band. Mobex proposes to do away with the planned 218-219 MHz Service auctions for remaining MSAs and RSAs and, instead, reallocate spectrum in those markets for AMTS.¹⁵ In making this suggestion, Mobex cites the purported lessons of the "unsuccessful IVDS market,"¹⁶ characterizing the service as "moribund" and having "no manufactured products in operation and no users of which Mobex is aware."¹⁷ As evidence that this is not the case now and will not be true in the future, the Commission need look no further than the comments filed in this proceeding and its own records demonstrating the influx of investment capital, the growth and success of new technology and the retention of more than 80 percent of 218-219 MHz Service licenses.¹⁸ To separate allocations of existing licenses from those to be auctioned or re-auctioned would create an unworkable hodgepodge of regulation. Moreover, Mobex' proposal would hinder the ability of present 218-219 MHz Service licensees to continue to develop their services successfully by capping the number of markets in which such services would be available thus creating a non-contiguous patchwork of service areas sure to frustrate customers and hobble commercial and consumer adoption of new services.¹⁹

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ *Id.* at 5, 6.

¹⁸ See generally Datex Comments; USTC Comments; Comments of Celtronix Telemetry, Inc.

¹⁹ See Mobex Comments at 7.

Securicor Wireless Holdings, Inc. (“Securicor”), whose subsidiaries are licensees in the 220 MHz Service, proposes to revamp the licensing system for non-Government operations in the 216-220 MHz band. Securicor argues that a “significant amount” of spectrum has yet to be licensed on a primary basis in 216-220 MHz band and that this spectrum should be subject to a so-called “Phase II” auction and licensed in a manner similar to spectrum in the 220 MHz Service.²⁰ Securicor argues that this re-allocation would “level the playing field” by creating similar regulatory parameters across neighboring frequency bands.²¹

Securicor’s proposal is nothing more than an attempt to pilfer spectrum from one viable service and annex it to another service based on misfounded beliefs and unproven claims. Indeed, Securicor’s argument is based on the fact that its 220 MHz Service spectrum happens to be adjacent to the 216-220 MHz band, and gives mere lip service to the public interest benefits offered by existing users in that band. Although Securicor acknowledges that its proposal must protect incumbent users authorized in 216-220 MHz band, including the 218-219 MHz Service, it offers only bare assertions that such protection is afforded by its proposal.²² In fact, Securicor suggests that incumbent operations should be relocated if interference protection is inadequate, but utterly fails to demonstrate how such relocation would be technologically or economically feasible for incumbents.²³

Furthermore, Securicor characterizes the licensing of the 216-220 MHz band, including the 218-219 MHz portion, as “haphazard and piecemeal,” without acknowledging the historical

²⁰ See Comments of Securicor Wireless Holdings, Inc. at 4-6 (“Securicor Comments”)

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.*

development of existing services or the technical, regulatory and other impediments that limited development of the 218-219 MHz Service before the Commission's 1999 rule changes.²⁴ Of course, any divisions of spectrum segments are necessarily arbitrary, and the existing allocations throughout the 216-220 MHz band should be viewed as efficient rather than tainted with Securicor's pejorative label. Moreover, Securicor's call for spectrally efficient and market-based spectrum allocations has already been answered in the 218-219 MHz band, where enhanced service and technical flexibility engendered by the *218-219 MHz Order* have paved the way for efficient use of that band.²⁵ Comments submitted by 218-219 MHz licensees demonstrate this fact. For example, Millennium Networks states that it plans to use the service to provide e-mail, instant messaging and other similar services to devices such as Personal Digital Assistants.²⁶ This use of the band contrasts markedly with the fixed and mobile applications planned by Datex, which involve remote meter reading and other applications.²⁷ The new rules permit market participants the flexibility to tailor their offerings to meet consumer demand, thus rendering Securicor's proposal misplaced.

Warren C. Havens proposes scrapping the existing licensing system for frequencies in the 216-225 MHz band and reallocating the entire nine megahertz for a self-named "Advanced Technology 220 MHz Service."²⁸ As conceived, this service apparently would replace, after an

²⁴ *Id.* at 2.

²⁵ See generally Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Report and Order and Memorandum Opinion and Order, FCC 99-239, WT Docket No. 98-169, RM-8951, 15 FCC Rcd 1497 (1999) ("*218-219 MHz Order*"). The Commission has made clear these 1999 rule changes were designed "to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition and provide services to the largest feasible number of users within the 218-219 MHz band." *Id.* at ¶¶1-2.

²⁶ See Millennium Comments at 2.

²⁷ See Datex Comments at 1.

²⁸ See Comments of Warren C. Havens at 2 ("Havens Comments").

unknown period, existing services such as the 220 MHz Service, the 218-219 MHz Service and AMTS with something called a “National Environmental Wireless Service.”²⁹ Without a shred of evidence, Havens argues that these existing services are “lightly used” and implies that his proposed services would constitute a higher and better use for the spectrum.³⁰

Havens’ proposal is an absurd proposition that warrants no serious consideration. First, Havens proposes to reallocate spectrum in the 220-225 MHz band, which is not designated for transfer in the instant proceeding; thus, the proposal exceeds the scope of the Government spectrum identified for reallocation by the National Telecommunications and Information Administration (“NTIA”) in its efforts to implement OBRA-93 and BBA-97.³¹ Moreover, to the extent that the technical aspects of Havens’ proposal are predicated upon the availability of 220-225 MHz spectrum, these proposals are not sustainable.

Second, Havens’ proposal fails to demonstrate any protection to incumbent primary licensees; to the contrary, Havens proposes that “incumbent ... licensees in these bands could elect to operate under the AT 220 MHz rules until a certain date, after which they would be required to conform.”³² As the Commission noted, “[a]ny new service allocated on a primary basis in this spectrum will be required to protect existing primary licensees, including AMTS licensees and licensees in the 218-219 MHz Service.”³³ Havens makes no claim that his proposed services can adequately protect incumbent users in the band consistent with existing

²⁹ *Id.* at 2, 4-5.

³⁰ *Id.* at 3.

³¹ *See NPRM* at ¶¶ 1-4.

³² *See* Havens Comments at 3.

³³ *See NPRM* at ¶ 11.

rules. By positing that incumbents should be required to conform to new rules specified for his proposed services, and by proposing tax incentives to spark participation therein, Havens misconstrues both the scope and effect of the instant rule making and of the Commission's authority to rule on certain aspects of his proposals. Even so, the merits of his proposal are dubious at best. For these reasons, Havens' proposal must be summarily rejected.

III. ELEVATION OF SECONDARY SERVICES TO CO-PRIMARY STATUS IS NOT IN THE PUBLIC INTEREST.

Some commenters have proposed elevating certain secondary services such as telemetry and Low Power Radio Service ("LPRS") to co-primary status in the 216-220 MHz band.³⁴ They suggest that existing interference protection rules would provide adequate interference protection to incumbent primary services.

These arguments miss the point. First, it would be unfair to 218-219 MHz licensees that purchased their licenses through the competitive bidding process to face new interference from existing users receiving an upgrade to primary service. This result would devalue existing licenses, mere months after licensees elected to retain more than 80 percent of their licenses. Second, the prospect of interference from co-primary service in the 218-219 MHz band would devalue the MSA and RSA licenses that remain subject to future auction, reducing interest and resulting in lower auction bids. The Commission is well acquainted with the adverse impact that auctioning encumbered spectrum would cause,³⁵ and certainly should not take affirmative steps to create such devaluation by designating certain services as co-primary. Those entities interested in providing telemetry services on a primary basis are certainly free to participate in

³⁴ See, e.g., Millennium Comments at 4; Instatel Comments at 2, 8-11; Electronic Tracking Comments at 15-16.

³⁵ See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, First Report and Order, 15 FCC Rcd 476 (2000).

upcoming 218-219 MHz auctions or negotiate partitioning, disaggregation or other private contracts with 218-219 MHz Service licensees capable of providing those services today. As the Commission correctly concluded, it would be "inappropriate" to permit new, co-primary services in the 218-219 MHz band, in light of "the potential to disrupt or limit the operation of the primary licenses."³⁶

Conclusion

As Datex' Comments and Reply Comments demonstrate, any effort to change the allocation of the 218-219 MHz band would disrupt incumbent services, threaten the long-standing efforts of Datex and others to develop the spectrum and undermine future benefits to the American public. Accordingly, Datex respectfully submits that the Commission should maintain the allocations currently applicable to the 216-220 MHz band and should reject proposals to re-allocate this band.

Respectfully submitted,

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April 9, 2001

³⁶ See *NPRM* at ¶ 15.

CERTIFICATE OF SERVICE

I, Kenn Wolin, Senior Legal Assistant, with Manatt, Phelps & Phillips, LLP, do hereby certify that I have caused a copy of the foregoing *Comments of Datex Spectrum, L.L.C. and U.S. Telemetry Corporation* to be hand-delivered to the following:

- 1) William F. Caton, Acting Secretary*
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